BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	Application 05-02-027 (Filed February 28, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING REGARDING ACCESS TO COMPETITIVELY SENSITIVE DATA

This ruling addresses the proposal of XO Communications Services, Inc. (XO), filed on May 10, 2005, in response to the TURN Motion to Compel Discovery. In its proposal, XO argued that Joint Applicants should be required to consent to TURN's providing XO with an unredacted copy of its Motion.

Position of XO

XO was provided only with the "public" version of the TURN Motion. XO requested that Joint Applicants authorize TURN to provide XO with an unredacted or "proprietary" version of TURN's motion. Because Applicants did not respond to XO's request, XO inferred that Applicants opposed XO's being provided a "proprietary" version.

XO argues that because it has executed the Applicants' Nondisclosure Agreement, there is no valid reason for Applicants to prevent XO representatives from having access to an unredacted version of the Motion. As a broader

principle, XO argues that this proceeding should not be conducted on a "star chamber" basis where key pieces of evidence are kept secret and, as a result, parties are not allowed to confront opposing parties through full cross-examination of their witnesses. XO argues that the hearings in this matter will be significantly compromised, both logistically and substantively, if the Commission does not ensure that all parties have identical access to confidential data presented to the Commission on an identical basis.

Although a ruling has already been issued on the TURN Motion, XO's request raised broader issues of due process and the general ground rules under which proceeding is to be conducted. Because the proposals of XO were raised for the first time in response to the Motion of TURN, there was no opportunity for Applicants to be heard concerning these proposals of XO. Accordingly, before issuing a ruling on XO's proposals, other parties were permitted to file comments.

Comments in support of the XO proposal were filed on June 3, 2005, by TURN, Qwest Communications Corporation (Qwest), the Community Technology Foundation of California (CTF), and jointly by Eschelon Telecom, Inc. and Advanced Telecom, Inc. (Eschelon / ATI). Applicants filed a response in opposition to XO's proposal. XO filed a supplement to its previously filed response on June 2, 2005, was granted leave to file a third-round response on June 6, 2005.

Position of TURN, Qwest, and Eschelon/ATI

TURN, Qwest, CTF, and Eschelon / ATI all support the proposal of XO. Qwest states that it has encountered similar difficulties in obtaining confidential materials, as reported by XO, whereby SBC seeks to provide certain materials to some parties, but not others. AT&T has indicated that it intends to limit access to

certain documentation through the use of an "Outside Counsel Only" designation, which does not appear in the Nondisclosure Agreements (NDAs) executed in this proceeding.

Eschelon and ATI also face somewhat similar difficulties, but seek access of the highly competitively sensitive information not just by outside counsel, but by company employees who would also engage in marketing activities. These witnesses are willing to sign the NDA and abide by its terms, which include a commitment not to use any confidential material for purposes outside of this proceeding. As long as the witnesses are willing to sign the NDA, Eschelon and ATI argue that such witnesses should be granted access to confidential information to the same extent as any other individual that signs the NDA. Eschelon and ATI also express willingness to entertain specific limited constraints on witness access to confidential materials "if the safeguards of the protective order demonstrably do not apply in a particular circumstance."

Position of Applicants

Applicants oppose XO's proposal. Applicants argue that the information at issue in XO's proposal is highly competitively sensitive, and that allowing competitors access to it would give them the opportunity to achieve an unfair competitive advantage harmful both to the Applicants and to the general public. For this purpose, Applicants indicate that there are only a limited number of filed documents designated as being so highly confidential that all parties have not been given access, even upon signing the NDA. Applicants identify these confidential materials as: (1) those that reference or attach four exhibits to the Application containing financial data regarding AT&T subsidiaries (Ex. 15-19 of the Joint Application), (2) the SBC California-specific synergies model (Ex. 1 to the Supplemental Application) and (3) a map and listing of AT&T location in

California (Exs. 2 and 3 to the Applicants' Reply to Protests). Applicants indicate that every party (who has signed a NDA) has been given access to all other information in—and exhibits to—all filings made to date in this proceeding.

Applicants argue that parties seeking to gain such access to the highly competitively sensitive data should first be required to make a showing as to relevance.

Discussion

There is no dispute as to whether the categories of information identified above by Applicants are highly sensitive. The dispute involves whether the restricted form of access sought by XO, or other parties that are also competitors, would give such parties the opportunity to achieve an unfair competitive advantage harmful both to the Applicants and to the general public. At the same time, this question must be weighed in light of the issue framed by XO, namely, whether it is a due process violation for Applicants to grant access to confidential data only to certain parties under seal, while denying access to other parties because they are competitors, even if they sign the NDA.

While Applicants object to giving XO and other competitors "*carte blanche* access to any and all filings made in this proceeding, without regard for their status as competitors and without consideration of the competitively sensitive nature of the information in question," XO is not seeking *carte blanche* access without any disclosure restrictions. Instead, XO is seeking access of confidential data only by its outside counsel and outside witnesses subject to the restrictions imposed under the Applicants' NDA. XO's outside counsel and outside witnesses would be prohibited from disclosing any of such competitively sensitive confidential data to employees or owners of XO engaged in marketing activities.

It is concluded that providing access to such documents to a company's regulatory counsel and consultants and employees who assist such counsel for case preparation is permissible, provided such individuals sign the Applicants' NDA and that they *do not* engage in any activities for the company relating to developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged to customers. Granting access to such individuals subject to the NDA would protect the data from being disclosed or used by competitors for marketing-related purposes while preserving parties' due process rights to examine data relevant to this proceeding.

At the same time, granting parties access to such confidential data, subject to these protections, will preserve parties' due process rights and ability to complete their case preparation and to develop a complete record in this proceeding. As pointed out by XO, the information that it seeks is relevant to the issue of whether SBC's acquisition of control of AT&T would adversely affect competition, and the resulting prices that SBC would be able to charge with the disappearance of AT&T as a competitor.

On the other hand, it is concluded that Applicants *should* be permitted to withhold access of the designated highly sensitive confidential data from those employees or agents of a competitor that *do* engage in the above-referenced excluded activities for the competitor. Even if an employee of competing company signs the NDA and does not disclose such highly confidential information to another individual, the employee would still retain knowledge of the confidential information. Even assuming the employee in good faith refrained from disclosing such information to others for competitive advantage, such an employee might still be influenced by competitively sensitive knowledge

learned through this proceeding in the course of making competitive business decisions.

Accordingly, it is reasonable to permit Applicants to withhold disclosure of the designated highly competitive materials from such employees or agents that are also engaged in marketing activities for the company even if they sign the NDA. Such an approach is consistent with how the Commission has treated access to confidential data by parties that are competitors in past telecommunications proceedings.[1]

Adopted Procedures for Access to Highly Confidential Data

Therefore, in order to balance the Applicants' concerns regarding protection of highly confidential data against parties' due process rights to discovery and development of a complete record, the following procedures are hereby adopted. These procedures apply only to those limited categories of documents identified above by the Applicants as "highly confidential."

Applicants must provide access to the above-referenced highly confidential materials sought by the following reviewing representatives of parties that are competitors of the Applicants: regulatory counsel and witnesses (on the condition that they do not engage in activities for the company, as defined below), and permitted regulatory employees of the party, all of whom must sign the Applicants' NDA. Permitted regulatory employees shall be defined as those who have a need to know the information for purposes of case preparation in this proceeding, including any appeals, and who do not engage in

[1] See, for example, the ALJ Ruling dated November 16, 1995, in R. 93-04-003 / I.93-04-002 entitled "ALJ Ruling Concerning Proposed Protective Order of GTE California Incorporated."

developing, planning, marketing or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers.

Applicants' proposal to require parties to make a showing of relevance before being provided access to such data is rejected. The fact that such data has already been provided to certain parties (e.g., ORA and TURN) already indicates that the data is relevant to the proceeding. It is therefore unnecessary for other parties to make a separate showing as to relevance as a condition of gaining access to such data. If an individual representing a competitor that is a party in the proceeding signs the NDA and is not engaged in marketing or related activities for the company, as previously described. Applicants are directed to provide access to such parties' representatives subject to the restrictions in the NDA.

Applicants are permitted to deny access to non-regulatory personnel (including attorneys) who are engaged in developing, marketing or pricing competitive products or services as previously described.

To the extent that prepared testimony or other exhibits prepared for this proceeding may contain such highly confidential information, such testimony or other exhibits should be identified with the label "Lawyers Only" and restricted in access in accordance with the procedures prescribed above.

Ability of Parties to Discuss Confidential Information Among Themselves

In order to help expedite the proceeding and limit potential duplicative evidentiary showings, XO also proposes that the Commission should rule that parties that have signed the Nondisclosure Agreements may freely discuss among themselves any information claimed by the Joint Applicants to be confidential, including "no copies" documents. The Community Technology Foundation also expresses support for XO's proposal.

There is no sound basis to prevent individuals representing parties that have gained access to confidential information as a result of signing the NDA from discussing such information among themselves. In order to make the most efficient use of time and to avoid potential duplication in case preparation or testimony, parties should be permitted to enter into discussions and coordinate their efforts accordingly. On the other hand, any confidential information should not be discussed in such meetings with individuals that have not otherwise been authorized access to such confidential information under the terms outlined in this ruling.

Accordingly, parties' representatives shall be permitted to discuss among themselves any confidential data already provided to them for use in this proceeding, but shall not be permitted to discuss confidential information with individual representatives that have not otherwise been granted access to the confidential information in accordance with this ruling.

IT IS RULED that:

1. The rules set forth above are hereby adopted relating to the terms by which access to the above-referenced highly confidential materials of Applicants shall be provided to certain representatives of interested parties that are also competitors of the Applicants.

2. Applicants are directed to promptly provide outstanding data response materials to XO and other parties with similar outstanding requests in accordance with the directives in this ruling.

Dated June 9, 2005 in San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Access to Competitively Sensitive Data on all parties of record in this proceeding or their attorneys of record.

Dated June 9, 2005, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.